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No. 08-1562

Supreme Court, U.S.
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In The
Supreme Court of the United States

SEA HAWK SEAFOODS, INC.,

Petitioner,

v.

EXXON MOBIL CORPORATION AND
EXXON SHIPPING COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Exxon erroneously argues that this Court should not grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit because Sea Hawk "has not demonstrated any conflict in the circuits." Opp. 14. That assertion cannot be squared with applicable case law. Summarizing the current state of the law, a leading treatise regarding civil procedure notes that there is a "lack of any uniform approach among the federal courts." 18B Charles Alan Wright et al. *Federal Practice and Procedure* § 4477, at 550 (3d ed. 2002). As set forth in Section I below, the inter- and intra-circuit conflicts regarding the requirements for establishing judicial estoppel are both clear and well entrenched, thus meriting this Court's review.

Exxon also argues that the decisions below correctly apply this Court's "flexible" analysis regarding judicial estoppel as set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001). Opp. 11-14. While Sea Hawk agrees with Exxon that the Court does not review factual disputes, Exxon clearly and repeatedly stated, *in writing and without qualification*, that it agreed to pay Sea Hawk compound interest. It did so for strategic reasons, hoping that it would be rewarded with a lower interest rate under federal law. As set forth in Section II below, the decisions below are erroneous in numerous respects. The *legal* issues presented by those decisions, as well as by Exxon's gamesmanship, clearly merit this Court's review.

ARGUMENT

I. THERE ARE WELL-ESTABLISHED AND DEEPLY ENTRENCHED CONFLICTS REGARDING JUDICIAL ESTOPPEL PRINCIPLES.

As Sea Hawk's Petition demonstrates, lower courts are deeply divided over the proper application of this Court's holding in *New Hampshire*. Pet. 10-16. A number of courts have expressly recognized a split – both inter-circuit and intra-circuit – regarding whether a court must accept or endorse a previous inconsistent statement in order to apply judicial estoppel. As the Eleventh Circuit explained, "[t]his issue has divided the Courts." *Transamerica Leasing Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1336 n.8 (2005). Other courts agree. *See, e.g., Thore v. Howe*, 466 F.3d 173, 182 n.2 (1st Cir. 2006) (noting that "[o]ther circuits have articulated other criteria"); *Lizotte v. Praxair, Inc.*, __ F. Supp. 2d __, No. C07-1868RSL, 2009 WL 564920, at *3 (W.D. Wash. Mar. 3, 2009) (discussing "minority" and "majority" view in circuits as to whether judicial estoppel "applies even if the litigant was unsuccessful in asserting the inconsistent position"). These cases show not only that a split exists, but that the split is widely recognized by lower courts.

In addition to quoting several authorities that have expressly recognized that a split exists among the circuits, Sea Hawk's Petition discusses several opinions showing how different circuits applying the Court's holding in *New Hampshire* have reached

conflicting results. Pet. 11-13. Sea Hawk explained, for example, that the Second Circuit has rejected a judicial estoppel argument on the sole basis that the district court had not accepted the party's previous position whereas the Third Circuit has concluded that judicial estoppel "does not turn" on that consideration. Pet. 12-13 (*citing Stichting v. Shreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *Krystall Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors*, 337 F.3d 314, 324 (3d Cir. 2003)). These opinions, both claiming to follow *New Hampshire*, are in direct conflict.

Exxon does not discuss or dispute the clear conflict between *Krystall* and *Stichting*. Instead, Exxon makes the odd assertion that the recognition of a circuit split in *Transamerica Leasing* and *Thore* is "dicta." Opp. 16. If by "dicta" Exxon means that neither the Second Circuit in *Stichting* nor the Third Circuit in *Krystall* squarely *held* that a split exists, the argument makes no sense. Whether "dicta" or "holding," it is clear that both courts and scholars have expressly recognized that a split exists among the circuits regarding the proper application of *New Hampshire*. This conflict is now firmly entrenched, as it has been eight years since the Court decided *New Hampshire*. Under these circumstances, this Court's review is both necessary and appropriate.

Exxon next attempts to minimize the existence of a circuit split by claiming that the Court's holding in *New Hampshire* is "flexible." Opp. 15 (internal quotation marks and citations omitted). But no rule can be so flexible as to allow two different courts to reach

contrary results on the same facts. If a factual assertion in a settlement agreement can never satisfy the requirements for judicial estoppel in one court (*see, e.g., In re Bankvest Capital Corp.*, 375 F.3d 51, 60 (1st Cir. 2004)), then another court's decision to allow judicial estoppel based on a settlement agreement (*see, e.g., Commonwealth Ins. Co. v. Titan Tire, Corp.*, 398 F.3d 879, 887 (7th Cir. 2004)) cannot be a "flexible" application of the same rule. Nor can this be "different verbal formulations of the same legal rule," as Exxon also claims. Opp. 15.

Not only do inter-circuit conflicts exist on these issues, but intra-circuit conflicts exist as well. Pet. 14 n.5. In *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1049 (9th Cir. 2004), for example, the plaintiff – like Exxon here – attempted to avoid judicial estoppel by seeking to qualify its prior statement that it was not bringing a "chargeability claim." The Ninth Circuit held that "[t]his change in position is precisely the kind of 'playing fast and loose with the courts' that judicial estoppel is designed to prevent." *Id.* at 1050. This case presents the same basic facts – Exxon is attempting to qualify its prior representation regarding compound interest to avoid judicial estoppel – yet the Ninth Circuit held that judicial estoppel did not apply here *only* because the district court "was not misled." Pet. App. 3. As Sea Hawk explained (Pet. 14 n.5), such intra-circuit conflicts exist in at least the Seventh and Ninth Circuits.

Nor can these results be explained by the Court's holding in *New Hampshire* that lower courts should

not create "inflexible prerequisites for determining the applicability of judicial estoppel." Opp. 15; *New Hampshire*, 532 U.S. at 751. A court that dismisses a judicial estoppel claim based solely on the lack of judicial acceptance (as in *Stichting*) or solely because "the trial court was not misled" (Pet. App. 3) has in fact created an inflexible prerequisite. The fact that Exxon is able to identify numerous appellate courts that, like the Ninth Circuit here, "emphasize" one factor over the others (Opp. 15 n.3) underscores the need for this Court to again provide guidance on the appropriate scope of judicial estoppel. *See* Eugene Gressman et al., *Supreme Court Practice* 253 (9th ed. 2007) (certiorari granted "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification").

Finally, contrary to Exxon's assertion (in its question presented) that a district court's ruling regarding judicial estoppel principles is reviewed for abuse of discretion, lower courts have split on that issue as well. In *Lorillard Tobacco Co. v. Chester, Willcox & Sabee*, 546 F.3d 752, 757 (6th Cir. 2008), the Sixth Circuit held that "this Court has continued to adhere to the *de novo* standard after *New Hampshire*." Other courts, in contrast, have reviewed such decisions for "abuse of discretion." *Wagner*, 354 F.3d at 1050. In *Leonard v. Southwestern Bell Corp. Disability Income Plan*, 341 F.3d 696 (8th Cir. 2003), the Eighth Circuit explained that "[t]his circuit has not clearly stated whether we review a district court's decision on the applicability of the collateral or judicial estoppel

doctrines under an abuse of discretion or de novo standard of review. *Other courts that considered this issue reached conflicting opinions.*" *Id.* at 700 (emphasis added). For this reason too, the Court should grant this Petition.

II. THIS MATTER RAISES IMPORTANT LEGAL ISSUES THAT MERIT THIS COURT'S REVIEW.

Exxon argues repeatedly that the issues presented by Sea Hawk's Petition are "factbound." Opp. 11, 14. That is incorrect. Sea Hawk asked the district court to interpret the parties' agreement as a matter of law. That agreement, drafted by Charles Diamond as counsel for Exxon and signed by both parties, states without qualification that "[t]he parties also agreed that prejudgment interest will be compounded annually." Pet. App. 51. This document is included in the Appendix to Sea Hawk's Petition. *Id.* The Court can review the document and decide for itself what is meant by the unqualified statement that "prejudgment interest will be compounded."

The same is true with regard to Exxon's other statements. Exxon repeatedly confirmed, in briefs and at oral argument, that the parties had agreed to compound interest. It informed the Ninth Circuit that "interest is to be *compounded*" and argued that federal law should govern the applicable interest rate "because the stipulation provides for interest to be compounded." Pet. App. 54 n.9, 58. And it informed

the district court that "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender Sea Hawk." Pet. App. 71 n.16. Here, too, the Court can review each of the statements and determine its meaning.

Addressing that issue, Exxon's assertion that its agreement to pay compound interest was "limited to federal law" (Opp. 10) makes no sense, both legally and factually. Exxon did not qualify *any* of its statements regarding compound interest. And contrary to Exxon's argument that Judge Graber did not address the judicial estoppel issue (Opp. 10), she recognized, as the undisputed record shows, that Exxon's agreement to pay compound interest cannot properly be limited to federal law:

- *First*, Judge Graber correctly noted that Exxon's agreement to pay compound interest "makes the most sense when applied to Alaska law, which requires an agreement to support compounding of interest." Pet. App. 3. In contrast, if federal law applied, Exxon's statements regarding compound interest were superfluous because compound interest is statutorily required by 28 U.S.C. § 1961(b) *regardless* of a separate agreement.

- *Second*, Judge Graber recognized that Exxon had agreed to pay compound interest "without qualification." Pet. App. 3. She added: "Because the question whether state or federal law supplied the rate was being litigated actively, and had been reserved for appeal, the lack of qualification is significant." *Id.*

This, too, has a direct bearing on judicial estoppel.

- *Third*, Judge Graber added that "under Alaska law, a contractual ambiguity is construed against the drafter." *Id.* Each statement regarding prejudgment interest was written or uttered by Exxon's counsel. To the extent any such statement is "equivocal," as Exxon claims (Opp. 2), it should be construed against Exxon.

Thus, while it is true that Judge Graber's dissent does not mention the words "judicial estoppel," her analysis applies equally to that doctrine.

With that background, it is clear that the question presented by Sea Hawk's Petition is outcome determinative and that Exxon's contrary assertion – that "the answer would make no difference here" (Opp. 17) – is incorrect. That question asks whether judicial estoppel requires (a) that a litigant's previous position was adopted or accepted by the court in which it was advanced, or (b) that a court was misled by the litigant's prior position. The record shows that the district court initially accepted Exxon's representation that interest would be compounded. In an April 12, 2005, order, the district court stated: "Sea Hawk raised the issue of whether prejudgment interest should be compounded annually. Exxon states that it has voluntarily agreed to compound the interest annually." Pet. App. 30 n.8. The same order also states: "The parties have agreed that prejudgment interest will be compounded annually; so, the motion is

granted as to that issue." Pet. App. 46. If such acceptance is sufficient to establish judicial estoppel, as Sea Hawk believes it should be, then Sea Hawk ought to prevail on this basis alone.

It was not until after the Ninth Circuit concluded that the interest rate should be determined by state law that Exxon reversed course and asserted – for the first time – that its agreement to pay compound interest was limited to federal law. By then, judicial estoppel already applied and Exxon was estopped from contradicting its prior statement. As Justice Scalia noted at oral argument in *New Hampshire*, "If you believed it was arbitrary, you shouldn't have signed this [it] seems to me, and I think we can hold you to what you sign." Oral Argument, *New Hampshire v. Maine*, 2001 WL 417672, at *37 (U.S. Apr. 16, 2001) (No. 130). The same reasoning is equally applicable here.

The lower courts did not so hold. Notwithstanding its own prior ruling that "[t]he parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue" (Pet. App. 46), the district court ruled in favor of Exxon and held that interest should be simple, stating that "it was the court's perception that Exxon's position was that prejudgment interest would be compounded if federal law applied." Pet. App. 15. The Ninth Circuit affirmed only because it believed – presumably based on the district court's post-hoc "perception" – that the district court "was not misled." Pet. App. 3.

These rulings do not withstand serious scrutiny, since (a) Exxon never qualified its numerous statements that the parties had agreed to compound interest, and (b) the district court accepted those statements and ruled that "the motion is granted as to that issue." Pet. App. 46. But none of these machinations is determinative here if, as Sea Hawk contends, judicial estoppel was triggered when the district court first accepted Exxon's position. The fact that the district court later claimed that it was not misled shows only that Exxon was successful in playing fast and loose with the court. Thus, contrary to Exxon's argument, the question presented here – which centers on whether the court was misled and whether a litigant's position was accepted – clearly makes a difference. Depending on how the Court resolves these issues, Sea Hawk may or may not prevail on its judicial estoppel argument.

Finally, even if this case were "factbound," as Exxon claims (Opp. 11, 14), that does not mean that Sea Hawk's Petition should be denied. Sea Hawk specifically represented in its Petition that Exxon made the statements at issue here to persuade the lower courts to calculate prejudgment interest in accordance with the lower interest rate dictated by federal law rather than the higher rate required by Alaska law. Exxon does not dispute that assertion. Whether the district court was or was not misled, and whether it accepted Exxon's position or not, this is precisely the sort of gamesmanship that undermines the efficacy of our judicial system, leads to unjust

results, increases the cost associated with litigation, and generates cynicism regarding the legal process. Thus, factbound or not, this case presents an invaluable opportunity to provide additional guidance regarding the circumstances in which courts hold litigants to their statements.

CONCLUSION

For the foregoing reasons, and as set forth in Sea Hawk's Petition, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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